

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Alteration
of the St. Croix River by
Gary and Dottie Mau, Without
A Permit from the Commissioner
Of Natural Resources

**FINDINGS OF FACT,
CONCLUSIONS,
RECOMMENDATIONS
AND MEMORANDUM**

A hearing in this matter was held before Administrative Law Judge Allan W. Klein beginning on May 12, 1999 in Afton, Minnesota. A site visit occurred on May 13. The hearing continued over portions of three days, concluding on May 17. The record closed on July 19, upon receipt of the final brief.

Appearing on behalf of the Department of Natural Resources was Assistant Attorney General Peter L. Tester, 445 Minnesota Street, Suite 900, St. Paul, MN 55101-2127.

Appearing on behalf of Gary and Dottie Mau was Robert W. Mudge, of the firm of Mudge, Porter, Lundeen & Seguin, 110 Second Street, P.O. Box 469, Hudson, WI 54016.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Natural Resources will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Allen Garber, Commissioner of the Minnesota Department of Natural Resources, 500 Lafayette Road, St. Paul, MN 55155 to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

Whether the Maus must comply with the Order of the Commissioner to remove designated structures so that their facility is not a “marina” or a “harbor”.

Based upon all of the evidence in the record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Beanies at Maui’s Landing (hereinafter "Beanies") is located in Lakeland, Minnesota, on property riparian to the St. Croix River. Gary and Dorothy (Dottie) Mau own and operate Beanies. The operation includes a recreational boat rental and public launching business, as well as the sales of fuel, bait, tackle and convenience foods. Beanies offers for rent seven fishing boats, (five of which have motors), five pontoon boats, one cabin cruiser, and four personal watercraft. The Beanies facility includes a boat launching ramp and docks for temporary mooring of watercraft while fueling or purchasing items at the convenience store. Beanies does not rent dock space to anyone.^[1]

2. The St. Croix River is a public water of the State of Minnesota. The Department of Natural Resources (DNR) administers the Protected Waters Permit Program, which requires permits for certain activities regarding alteration of the course, current or cross section of public waters. Both the federal government and the State of Minnesota have designated the portion of the St. Croix River adjoining Beanies as a Wild and Scenic River. This results in additional restrictions on activities affecting the river.

History of Dockage at Beanies

3. Beanies was established around 1918 as a commercial fishing business. The business later expanded to include the rental of fishing boats. Beanies has provided boat launching, and other ancillary services, for decades. Initially, wooden rental boats were moored out in the river some distance from shore^[2]. Beginning in about 1957, aluminum fishing boats replaced wooden ones and were stored upside down on top of some of the docks.

4. The Beanies facility has always had docks in the river; but the configurations have changed frequently over the years. In the late 1950's, the facility had a "T-dock"^[3]. A second dock was used to moor large fishing boats^[4]. The T-dock was anchored into the bed of the river with "spud poles. The portion of the T-dock parallel to shore was used to protect fish stored in crates from wave action. Aluminum fishing boats were also stored on top of the portion of the T-dock which was perpendicular to the shoreline. The boats were generally stored upside down on top of the dock with no motors attached. Some fishing boats were stored upright with motors attached.^[5] At some point between 1964 and 1984, the portion of the T-dock which was

parallel to the shoreline was destroyed. After 1984, that portion was never replaced.^[6] The remainder of the T-dock, and a second dock, were still used. When the new I-94 bridge was constructed, a third dock was installed.^[7]

5. In 1987, Mark Miller became the owner of Beanies. He continued with three docks, but the exact dock configuration changed from year to year.^[8] Miller rented out aluminum fishing boats, storing them upside down on the docks.^[9] Then at some later point, Miller began mooring three pontoon boats alongside one of the docks.^[10]

Permit applications at Beanies prior to the Maus

6. In 1988, the Department and the Army Corps of Engineers (hereinafter "the Corps") inspected Beanies, with particular concern about the placing of concrete fill into and along the river as a method of shoreline protection. During the inspection, Department personnel observed three unpermitted docks in the river. Miller was advised that he needed permits from both the Department and the Corps for his docks.^[11]

7. On May 2, 1989 Miller submitted a permit application to the Department. This application was given the number 89-6443. The permit application was for two separate actions: (1) Placing riprap and landscaping to improve shoreline protection, and (2) replacing old docks with new seasonal docks. The proposed dock configuration was elaborate. It included five separate structures with spaces for at least 25 boats.^[12]

8. On May 23, 1989, area hydrologist Molly Shodeen informed Mr. Miller that an environmental impact ("EIS") study would be required before the Department could consider his proposed dock configuration because it would constitute an expansion of an existing marina.^[13] Shodeen regarded the proposal as "an expansion over what historically had been at the property based on photography...." ^[14] Then, on June 15, 1989, John Linc-Stine the Department's regional hydrologist, informed Miller that before he began work on an environmental impact statement, he should understand that it would be "unlikely" that the Department would be able to issue a permit for all of the mooring spaces requested. Stine noted that docks 2 and 3 proposed in-water mooring for 18 rental boats, which was an expansion from past history. He noted, however, that the Department would issue a permit for replacement of three smaller structures, which included mooring spaces for pontoon boats. Stine quoted from Minn. Rule pt. 6105.0410, subp. 2, which suggests that dry-docking facilities for the storage of boats was an alternative to mooring along a dock.^[15]

9. Following a meeting on January 8, 1990, Stine again wrote to Miller, indicating that an EIS would be needed and discussing various practical methods for proceeding with it.^[16]

10. Shortly thereafter, on January 24, 1990 another DNR employee, Steve Johnson, reminded Stine that a marina would be prohibited under any conceivable circumstances in that part of the St. Croix. Johnson suggested to Stine that there was

no reason to encourage Miller to prepare an EIS when there was no possibility of permitting a marina at that location.^[17] Apparently in response, Stine wrote Miller on February 7, 1990, alerting him to the fact that the Department would be precluded from issuing a permit for docks 2 and 3 (the ones that proposed moorings for 18 rental fishing boats) even if Miller did prepare an EIS, unless Miller could document the historical use of the property, particularly Miller's claim that for many years there had been over-water storage of boats. Stine asked for affidavits or photos from neighbors or others that could document the type of over-water mooring, the number of boats stored, etc. Stine reminded Miller that the only way he could get a permit is if the project was not classified as a "new or expanded" marina, but rather as an "existing" facility.^[18]

History of Permit Applications Pursued by the Maus

11. In May of 1991, Mark Miller sold Beanies to the Maus. In addition to the property, the Maus purchased three pontoon boats and 11 or 12 aluminum fishing boats. They leased out the boat launching and rental business in 1991, then in 1992 they began to operate the business themselves. They observed that the existing docks and boat launching ramp were in disrepair, and initiated plans to replace them. The Maus met with DNR officials in the summer of 1991 to discuss the restoration of the riverbank and the status of Miller's outstanding permit application.^[19]

12. On February 10, 1992, Stine wrote to the Maus, asking for a summary of their plans and a proposed timetable for the riverbank restoration. He also asked if they were interested in pursuing Miller's dock plan. Stine reminded them that it would be difficult to obtain approvals if the plans involved an expansion of the marina facility.^[20]

13. On March 4, 1992, Stine received a response from the Maus. They indicated that they did desire to move ahead with the bank restoration, but were limited by a lack of funds. They also requested a copy of Miller's permit application.^[21]

14. On March 12, 1992, Shodeen sent the Maus a copy of Miller's permit application and other materials from the application file. She noted the permit had never been issued because the proposal appeared to be an expansion of a marina, which required preparation of an EIS. She indicated the number of mooring spaces was an issue, explaining that temporary docks do not require a DNR permit unless they provide mooring spaces for five or more boats. She stated that in order to issue a permit without an EIS, the Department would need historical documentation of the number of boats which had been "moored" at the facility.^[22]

15. On March 23, 1992, Ben Wopat of the Corps sent the Maus a letter, indicating that the Maus should get moving on removing unauthorized concrete material which Miller had placed into the river. Wopat also noted that the Maus would have to file a permit application with the Corps if they proposed to add docking structures or change the alignment of the historical structures.^[23]

16. On May 19, 1992, the Maus sent a letter to Shodeen, indicating that they were starting to work on the riverbank restoration project, but would have to do it in phases over the next year or two. The Maus also indicated that they were reviewing historical data to try to document prior dock configurations, but that any additional dock space would be added in the next year.^[24]

17. On October 19, 1992, the Maus filed a Protected Waters Permit Assignment with the Department. It documented Mark Miller's assignment of all rights, interests and duties in permit 89-6443 to the Maus.^[25] As of that date, no permit had been issued in response to the application. All that was being assigned was the right to the application.

18. On October 19, 1992, the Maus submitted a letter to Shodeen which essentially constituted an amendment to Miller's permit application. It requested permission to upgrade and repair the existing launch ramp, as well as a revised configuration for new docks. The revised dock configuration consisted of two docks, which were parallel to each other, separated by approximately 106 feet. The northernmost dock which was the smaller of the two, would be 56 feet long, while the south dock would be 80 feet long. At the far end of the south dock, a "fishing pier/breakwater" structure extended to the north, for 106 feet. Since the south dock was 24 feet longer than the north dock, this fishing pier/breakwater structure was 24 feet riverward of the end of the north dock. This had the effect of creating a 24 foot opening between the north dock and the pier through which boats could pass into a protected harbor.^[26] The south dock included slips for 13 boats, while the north dock had two slips plus an area labeled "pontoon parking". The drawing illustrated the use of spud poles, but no pilings, to anchor both docks in the water.^[27] Also attached to the October 19 letter were historical photographs and a document setting forth the history of Beanies in the early part of the century.

19. On February 19, 1993, the Maus submitted to the Department photographs taken by the Corp of Engineers in 1988. With that submittal, the Maus argued that "except for the past two years, the docks we are asking for have existed for many years. Configurations have changed numerous times but docks, considerably more than we currently have, have existed on site continuously since the mid-1950's."^[28]

20. On March 25, 1993, the Department issued a limited permit to the Maus. The permit allowed for the removal of the existing boat ramp and its replacement with a new ramp. It did not allow for any dockage or breakwater construction. It was labeled P.A. No. 89-6443.^[29]

21. Along with the limited permit, the Department sent an explanatory letter dated March 25, outlining its position with regard to dockage. The letter notes that the limited permit does not allow for the proposed dockage plan because the proposed dock provides for the mooring of five or more boats, thus constituting the facility as a

“marina”. The Department reasoned that photos going back to the time that the river was designated show that Beanies did not have the number of slips proposed in the latest plan, and that the previous docks provided “mainly tie along spaces for customers and did not moor pontoon boats until recently. The DNR does not regulate temporary docks unless they provide mooring for five or more boats.”^[30] The letter went on to indicate that the dock plan proposed by the Maus would constitute an expansion of an existing marina, which would require an EIS pursuant to the Environmental Quality Board’s (“EQB”) environmental review program rules. The letter goes on to suggest that the Department would be happy to discuss “future proposals you may have that might not exceed the environmental review guidelines requiring an EIS”. The Department viewed the issuance of the limited permit to be a denial of the dock proposal in the application, and thus gave the Maus notice of their appeal rights.^[31]

22. On April 4, 1993, the Maus completed a Local-State-Federal Project Notification Form in connection with their new launching ramp and new docks. The form indicated that the activity would begin on April 15, 1993 and be completed on August 31, 1993.^[32]

23. Sometime between March 25 and May 11, Gary Mau talked with Molly Shodeen. Shodeen told Mau that if he reduced his proposal to four or fewer slips, the Department would not regulate the dockage.^[33] On May 11, 1993, the Maus directed a letter to Ralph Augustin of the Corps of Engineers. The gist of the letter was that Maus were seeking Corps approval for a modified proposed dockage plan.^[34] They closed their letter with the following language:

“We appreciate your patience with this lengthy explanation of what has occurred in the multiple documents that accompany this application. Our decision not to contact you sooner was based on the initial understanding that the DNR was the authorizing agency. With the business changes, the need for improved dockage is even more critical to accommodate all of our new and renewed customers.”

24. On September 13, 1993, the Corps issued a public notice of the Maus’ Application for Permit to Replace an Existing Boat Ramp and Modify and Upgrade Existing Dockage. Attached to the public notice was a map of the general area showing the project site and, more importantly, a drawing of the proposed dockage. The drawing demonstrates a reduction of the dockage originally proposed by Mark Miller in 1989 and re-submitted to the Department in October 1992. While the basic “harbor” configuration remained the same, with a long fishing pier/breakwater protecting the inland area from wave action and only one 24 foot opening, the number of slips was dramatically reduced. The south dock, which had previously been proposed to have 13 slips, now only had five. Four of these were 10 feet wide, while the fifth was 24 feet wide. The north dock was also reduced in slippage: previously it had proposed to have two ten-foot slips plus an additional large “pontoon parking” area. The revised proposal showed only an L-shaped dock, 56 feet long with a 30-foot extension at the end running parallel to the shore. There were no separate slips in this new configuration.^[35] A copy of the

Corps notice was received by the Department's Division of Waters on September 7, 1993.

25. On October 14, 1993, the Department responded to the Corps Public Notice with a letter which had been drafted by Shodeen, but signed by Dale Homuth.^[36] Critical portions of the letter read as follows:

The Department of Natural Resources (DNR) has reviewed the above-mentioned notice to replace and install new waterfront docks at Maui's (Beanies) landing. The Department has regulatory authority over seasonal docks that provide mooring spaces for five or more watercraft. This configuration of docks contains four slips.

The Maui's [sic] have already been issued a DNR permit to reconstruct the boat landing. I believe they have also amended their conditional use permit with the City of Lakeland to allow the addition of a gas dock.

Improvements to this facility must be consistent with conditions similar to what existed when the river received the wild and scenic designation. Any improvements that could be considered an expansion over pre-existing conditions, cannot be approved until an environmental impact statement is prepared (Minn. Rules pt. 4410.4400, subp. 19).^[37]

The letter does not mention whether the proposed configuration constituted a "harbor" because, as Shodeen acknowledged, "[I]t did not occur to us" that the breakwater dock would create a harbor and thus trigger environmental review.^[38] In the course of commenting on Corps Permit Applications, it is the Department's practice to acknowledge whether a DNR permit is needed or not,^[39] and had they recognized the "harbor" issue at that time, they would have mentioned it in the letter to the Corps.^[40] The Maus were sent a copy of the Department's letter to the Corps.^[41]

26. On December 30, 1993, the Corps informed the Maus that a "favorable determination" had been made on their application, and sent the Maus two copies of a proposed permit, indicating that if the Maus found the various conditions to be acceptable, they should sign them and return them to the Corps office, where they would be finally signed by the Corps.^[42] Gary Mau signed on January 25, 1994, and Ben Wopat signed on behalf of the Corps on February 7, 1994. The Corps permit became effective on February 7, 1994.^[43]

27. The Corps permit includes the drawing described above in Finding 24, including the long fishing pier/breakwater, four 10-foot slips and one 24-foot slip on the south dock, plus the L-shaped dock on the north with no slips. The Corps permit contains a statement that "this permit does not obviate the need to obtain other federal, state or local authorizations required by law." It also contains a special condition as follows:

This permit authorizes the use of the docks and piers to support the permittee's business. This business includes boat rental, gas sales, bait and fishing supplies sales, and the use of the dock as a fishing pier. The leasing of dock space for boat moorage is not authorized by this permit.^[44]

On February 8, the Corps returned an executed copy of the permit to the Maus, and in the cover letter reminded them "this federal authorization does not permit you to commence the proposed activity without first obtaining any necessary state and/or local permits."^[45]

28. After obtaining the Corps permit, but no DNR permit, the Maus began to install new docks at Beanies. New structures were gradually added each year from 1994 to 1996. In 1994, the Maus removed old docks and installed the portion of the south dock perpendicular to shore, the four slips on the south dock, and a gas dock on the southwest corner of the south dock.^[46] In 1995, the first half of the north dock, including one fishing boat platform at location X12^[47] was added.^[48] In 1996, the second half of the north dock, including a second fishing boat platform at X13, was added.^[49]

29. By 1996 the Maus had built a facility that differed in many respects from what had been approved by the Corps.^[50] The following structures, absent from the Corps permit, were added by the Maus: two personal watercraft lifts attached to the north dock, a small storage shed placed on top of the gas dock, and two platforms attached to the north dock (X12 and X13) for the storage of fishing boats in a "ready to launch" position. Similarly, the configuration of docks installed also differed from that used by previous owners.^[51]

30. On November 30, 1996, the Maus asked the Corps for a one year extension of time to complete their dock work. They indicated that a change in the no-wake zone directly in front of the property forced them to change to a "significantly more heavy duty dock" in order to accomplish the desired safety and longevity.^[52] On April 8, 1997, the Corps agreed to extend the completion date to December 31, 1997.^[53]

31. At the same time that Beanies was in the process of constructing its new docks, the I-94 bridge was in the process of being replaced by a new bridge. In order to protect the construction zone necessary for the new bridge, the Corps of Engineers adopted a temporary "slow-no wake" zone which extended from south of Beanies, past Beanies, past the bridge, and to an area well north of the bridge. This had the salutary effect of reducing wave action at Beanies. But this temporary zone was removed once the bridge was finished, so that the area immediately in front of Beanies was no longer in the zone. Instead, the area immediately in front of Beanies was the area used to accelerate and decelerate boats which were either leaving or entering the zone. This led to large wakes and wave action. The Maus believed that they needed to do something to protect their docks and boats from damage and provide safe access to boats by their customers. After consultation with dock builders, they decided that a stronger design for their proposed "fishing pier/breakwater" dock was needed. They

asked William Nelson, a local dock builder, to design a breakwater dock that would protect moored boats and launching boats from waves.^[54]

32. In 1996, the Maus believed that structures stronger than spud poles were needed to anchor their breakwater dock. They decided to install permanent steel pilings driven into the riverbed. Jon Johnson, manager of Beanies, spoke by phone with Ralph Augustin of the Corps to determine whether any additional permit was required to use such pilings to secure the dock. Mr. Johnson was told that no additional permit was required. However, Mr. Johnson did not ask Mr. Augustin whether or not a DNR permit was required to install pilings in the river.^[55] Mr. Augustin was not familiar with the DNR's jurisdictional criteria regarding placement of structures in the river, but if he had been asked directly, he would have advised Johnson to consult with the DNR whether a DNR permit was required.^[56]

33. For a few years prior to the winter of 1996-97, the Department had been receiving complaints about the slow expansion of Beanies since the Maus owned the property. The number of complaints seemed to increase after the boat launch was replaced. They fell into two categories: (1) The mooring of five or more boats on a "permanent" basis; and (2) parking of cars and trailers on residential streets and similar land use issues. On March 17, 1997, Molly Shodeen wrote to the City Clerk of the City of Lakeland, indicating that the Department would monitor the mooring of boats during the summer of 1997 because:

The Maus and Mr. Mark Miller before them, had proposed mooring all of the rental boats in the water. It was determined that an environmental impact statement (EIS) would be required for such a proposal because it would constitute an expansion of the historical use of this property. Therefore, it was decided by the owners to live within the four or less boat mooring spaces to avoid the costly environmental review process. If there are five or more boats, this would be a misdemeanor and legal action by the Department would need to be reviewed.^[57]

34. Shodeen indicated that while the Department would monitor the number of boats, it was the City's jurisdiction to deal with the parking and land use problems.

35. In late June of 1997, the Maus had a contractor install six steel pilings into the riverbed in order to provide a secure anchor for their proposed fishing pier/breakwater structure. They did this without asking the DNR whether a permit was needed.^[58]

36. The installation of the pilings brought the Beanies matter to a head.^[59] The pilings were intended to be virtually invisible once the dock was installed – they would be cut off to a relatively short height above the water. However, when they were first installed, the pilings were (and still are) very noticeable. They are roughly ten inches in diameter and 15 feet high, which is much taller than any other structure nearby (except for the I-94 bridge).

37. Almost immediately, the Department received complaints about the pilings. The Department investigated on July 15, 1997. In addition to the pilings, Ms. Shodeen observed a gas dock with a storage shed placed on it, the four slips extending from the south dock, two personal watercraft “lifts” attached to the north dock, and two separate platforms attached to the north dock holding several small aluminum fishing boats in a “ready to use” configuration.^[60]

38. On July 15, 1997, at a meeting on the site, Shodeen informed the Maus that their facility was a marina because more than four boats were being moored at the slips, gas dock, south dock and the north dock.^[61]

39. As soon as the Department expressed its concern to the Maus, they stopped construction of the fishing pier/breakwater dock, and took no further steps until the matter could be resolved.

40. On July 30, 1997, Shodeen sent a letter to the Maus, summarizing the current status and setting the stage for subsequent proceedings in this matter. The letter also announced that the Attorney General’s office had advised the Department that the Department could not issue a permit for the fishing pier/breakwater without an EIS because it would cause the facility to be a “harbor”, and thus it would trigger the environmental review rules.^[62]

41. The July 30 letter also stated that the facility, as built, provided more than four mooring spaces, and thus constituted a “marina”, subject to the environmental review process in the case of an expansion. The Department indicated that the gas dock which had been added provided at least one temporary mooring space which, in the Department’s opinion, counted in the mooring facility numbers. The gas dock itself would be considered an expansion, requiring environmental review, since the facility did not previously dispense gas in that manner. A small shed structure on the gas dock would have to be removed, and certain signage would also have to be removed.^[63]

42. On August 29, 1997, Mau responded to Shodeen, acknowledging a meeting which took place on August 27 on site, and indicating that Beanies would like to submit an application for an after-the-fact permit for the pilings.^[64] On September 15, Shodeen replied, enclosing a permit application form.^[65] On November 4, 1997, the Maus submitted a local-state-federal water resource project notification/application form, which when returned to the DNR, was assigned permit application No. 98-6063. It seeks permission for the pilings, explaining that they were needed to moor docks to assure safety of customers due to severe wake problems.^[66]

43. On November 28, 1997, the Maus submitted a drawing to the Corps showing proposed design modifications to the dock configuration which the Corps had previously approved. The modifications included the addition of a jet ski lift and the two

platforms on the north dock, the pilings already installed to hold the proposed fishing pier/breakwater dock, the addition of a slight extension of that fishing pier/breakwater structure to the south, and the addition of the gas dock and building structure on the south side of the south dock.^[67] In addition, the Maus requested a further extension of time to complete the work authorized under their existing permit. On December 11, the Corps responded that the dock pilings would have to be cut down to a minimal level, the two jet ski lifts could not be reinstalled,^[68] and that the request to retain the dock house on the fuel dock would be evaluated as a separate matter. Otherwise, the Corps allowed the time extension for the permit to December 31, 1998.^[69]

44. On January 12, 1998, Shodeen responded to the Maus' DNR "after the fact" permit application. The letter announced the Department could not issue a marina permit to the Maus, regardless of whether they completed an EIS or not. The letter directed the Maus to remove the gas dock, relocate the small shed structure on the gas dock, remove the fingers and the jet ski lifts on the north dock, and limit its use to a make-ready dock for boat launchers, remove the portion of the south dock that extended beyond the fourth slip, and remove or relocate the advertising sign. In addition, Shodeen notified the Maus that the proposed construction of the fishing pier/breakwater would make the facility a "harbor", requiring the preparation of an EIS. If the Maus were unable or unwilling to prepare an EIS and pursue the harbor matter, they would have to remove the pilings from the bed of the river.^[70]

45. On January 26, 1998, the Maus responded, asserting that they had reached an agreement with the Corps regarding the pilings and that they understood the Corps to be the permitting agency for them.

46. On February 9, 1998, Shodeen responded, indicating that it was the Department's position that both the Corps and the Department have permit authority on the St. Croix River, and that the Maus must comply with both agency requirements. The letter stated that the Department also has jurisdiction over permanent structures such as the pilings, and recommended that the Maus not expend financial resources lowering the tops of the pilings at this point, since they are not authorized by the Department.^[71]

47. On June 17, 1998, a diver inspected the river bottom in and around the six new pilings. He reported no sediment buildup or scouring occurring around any of them, and also reported the presence of three types of mussels, (all area natives, not zebra mussels) on them. He opined that there was no environmental impact to the mussels or the bottom from the pilings, and that they would "work well" for vertical fish habitat.^[72]

48. On September 29, 1998, the Department issued a Denial of Permit Application 98-6063 and, on that same date, issued Findings of Fact and an Order to Restore. The denial letter states that the Maus had verbally advised the staff that an EIS would not be prepared, and that therefore activities creating a marina or a harbor would not be further reviewed, and the application would be administratively withdrawn.

The letter explained that the proposed fishing pier/breakwater did create a harbor. It also opined that the dock structure, as presently in existence, constituted the expansion of a marina and it was unlikely that the structure could comply with the lower St. Croix Rules, part 6105.0410, subp. 2. The Findings of Fact and Order outline the steps necessary to bring the facility into compliance. It directs the Maus to remove the gas dock and the structure on the gas dock; to remove the fingers and the jet ski lifts on the north dock, and limit its use; to remove the portion of the south dock that extends beyond the fourth slip; to remove the advertising sign or at least relocate it; and, to remove the pilings from the water or cut them off flush with the river bottom.^[73] At some unspecified time the Maus requested a hearing, and on March 18, 1999, Commissioner Allen Garber issued a Notice and Order for Hearing, setting the hearing in this matter for May 12, 1999 in Afton.^[74] On March 23, 1999, the notice was published in the Stillwater Evening Gazette.^[75]

Other Facts Relating to Whether Beanies is a "Harbor"

49. At the hearing, the parties stipulated that if the facility were actually constructed as depicted on DNR Ex. 34, with the north dock, the south dock, and the long fishing pier/breakwater, then it would constitute a "harbor" as defined in Minn. R pt. 6115.0170, subp. 16 and that, absent some equitable estoppel or other intervening reason, it would require an environmental impact statement under the EQB rules before the Department could issue or deny a permit.^[76]

50. The essential layout of the north dock, the south dock, and the long fishing pier/breakwater stipulated as a "harbor" is the same essential layout as contained in the Maus' Corps permit #93-06649 which was provided to the Department's Division of Waters in the Corps' public notice, and which the Department responded, to in its October 14, 1993 letter.^[77] The Department's response to the Corps notice said nothing about a "harbor", and a reasonable person would assume that the absence of such a reference indicated that there was no issue with regard to the facility being a harbor.

51. From that point forward until July of 1997, there were numerous contacts between the Maus and Department personnel. At no time until July of 1997 was there any suggestion by Department staff that the existence of the fishing pier/breakwater would cause the facility to be a "harbor" within the meaning of the rules. The reason that Department personnel did not mention it to the Maus was because they did not take that position until July of 1997. As Shodeen candidly testified: "When we were reviewing the Army Corps permit, it [the harbor issue] did not occur to us."^[78] Later Shodeen was asked whether she would have commented on the issue in the 1993 letter if she had been aware of it, and she testified: "I most certainly would have." She also testified that she would have orally told the Maus about it if she had realized it.^[79]

52. The Department would consider issuing a harbor permit following favorable environmental review, consideration of public comment, and compliance with the applicable harbor rules. However, the Department would not issue a harbor permit

if Beanies constituted a new or expanded “marina”.^[80] Although it is virtually impossible for Beanies to get a marina permit, it is possible for the facility to get a harbor permit.

53. The proposed fishing pier/breakwater would float on the surface, secured by the pilings. It would not extend all the way down to the bed of the river (a distance estimated to be well over 10 feet). It would, however, protect the enclosed area from waves. It was intended to protect both boats being launched from the ramp and boats moored or tied up to the docks.^[81]

Other Facts Relating to Whether Beanies is a “Marina”

54. Beanies has operated for decades in essentially the same manner as it is operating now – renting boats to the public and offering ancillary services. It has never had a permit as a marina, and insofar as this record discloses, its 1993 limited permit to replace the boat ramp was the first permit that the Department had ever issued to Beanies. Therefore, the Department has never issued a permit to Beanies specifying which dock locations constituted “moorings” and which constituted “tie-along spaces”. Neither has the Department had an opportunity to issue a permit specifying how much time had to elapse before a boat’s continuous presence at a space caused the boat to be counted as a “moored” boat. The Department has addressed these questions in the context of marina permits issued to other facilities on the St. Croix, but has not done so in the case of Beanies.^[82] This failure to have specifics in a written permit resulted in a variety of interpretations of the Rules, particularly the question of what constituted “mooring” of boats. At one extreme, the Department staff argued that any dock space large enough to accommodate a boat tied to it constituted a mooring space. Using that definition, there is no distinction between a space used for mooring and a space used for tying-along.^[83] It would not matter whether a boat were there for five minutes or five days.^[84] At the other extreme, Department staff has also written permits that specify that a space is not a mooring space so long as a boat is not there in excess of some specified time. Most use a 12-hour time frame, but some have 24 hours, some have 48 hours, and some may even be up to a week.^[85]

55. Putting the definitions of “marina” and “mooring” from the Rule together, the following emerges:

“Marina” means either an inland or offshore structure for the concentrated containment of five or more free-floating watercraft that provides a fixed fastening for the craft [and] facilities are provided for ancillary services...”^[86]

56. Historically, however, the Department has looked to the actual **use** of a dock space in order to determine whether or not it is a mooring space. As Homouth explained:

Q: (By Mr. Tester): Now, you used the phrase “potential mooring spots.” What do you mean by that?

A: (By Mr. Homouth): Well, mooring is defined as having a watercraft continually tied to a structure, in this case, the dock where you could fasten the watercraft to, potentially constitutes a mooring spot depending on how it is used, and that herein lies the problem especially in the south side of the north dock.

We would concede that that [the south side of the north dock] is most commonly used as a very short-term tie-along area where people load their boats and is not a true mooring spot, but it's long enough that there's a potential if they wanted to, I suppose the mooring regulations they could lease a spot for somebody to moor a boat up into the end of the dock.

Q: And you had said that these were potential spots unless controlled by something?

A: Right.

Q: What was the something that you were referring to that would control those?

A: In a typical marina situation where you have an actual permit for a marina, we have a number of, what they call, tie-along areas. We do realize there are areas that are not true mooring spaces or slips that people come in to use the facility, to buy bait, to buy pop, buy gas, whatever, tie-along, pull up and tie-along in order to get off their boat and go buy that and leave then. We usually do not count those as true mooring spaces in permitted marinas.

Q: Is there something in a marina permit that specifically addresses those spaces, and if so, tell us what is oftentimes in there?

A: Yes. Most commonly, the more recent permits that we amended and they're working on was the time line. We say you can use a certain spot along a dock as a tie-along space. We won't count it as a mooring space provided that no boat remains there for more than 24 or 48 hours, whatever is reasonable for the facility and the way they're operating.^[87]

57. The Maus believed their facility is not a marina because they "moor" four or fewer watercraft in the water at a time.^[88] They define "moored" as being parked at a space for less than 12 hours.^[89] The source of their 12 hour criteria is not evident from the record. To maintain a non-marina status, the Maus attempt to follow a procedure whereby one or more pontoon boats are to be pulled out of the water so that only four boats are in the water for greater than 12 hours.^[90] Under this procedure, five or more boats may be moored "overnight," yet be in the water fewer than 12 hours.^[91] Dottie Mau believes that they have "moored" five watercraft in the water at Beanies overnight, but never for greater than 12 to 14 hours.^[92] The Maus have never considered the fishing boats on top of the platforms on the north dock to be "moored" there.

58. The Department staff has identified 16 "potential mooring spaces" at the Beanies facility. Each potential site was designated by a numbered X on figure 1, which is attached to this report for convenience. It was based on DNR Ex. 34, which was used to mark these locations during the hearing.^[93]

59. The four slips regularly used for the parking of pontoons (spaces X4, X5, X6, and X7) are clearly mooring spaces. The Maus regularly have four pontoon boats in those locations, and the boats remain there unless they are taken out by a customer or unless they are pulled out of the water for some unusual reason.

60. During the boating season, the Maus store up to seven rental fishing boats on two platforms which extend from the north dock.^[94] These were labeled X12 and X13. The fishing boats are stored permanently in an upright position with motors attached. There are "holders" attached to the platforms that maintain the boats in an upright position.^[95] The Department now asserts that these platforms are mooring spaces because "they occupy surface water that's no different than if there was a physical slip that was constructed to contain [the boats] - it's just a different way or mooring them."^[96] However, that position is contrary to historical assertions made by Shodeen to the Maus to the effect that the boats up on the platform need not be counted when determining whether there were five or more boats that were moored.^[97] She did not count them in the 1993 comments on the Corps' public notice,^[98] nor did she count them in her 1997 letter^[99] which implies that the gas dock (which provided at least one temporary mooring space) moved the number of spaces from four to five. Until some time in the summer of 1997, the Department staff had not counted the platforms on the north dock as mooring sites.^[100]

61. Other spaces along docks are used primarily as temporary parking spaces used in conjunction with the launching of boats or for temporary tying while the users are in the convenience store. The estimated length of a single visit in these circumstances is about half an hour or less.^[101] Boats also parked at location X3 while obtaining fuel, but again it is not for lengthy periods of time, except as noted below.^[102]

62. In emergency situations, greater than four boats have been parked at the docks for an extended period of time.^[103] Some of the circumstances entail waiting out a storm, mechanical breakdown, or detainment by the Washington County Sheriff following a boating violation.^[104] Boaters may wait several hours for inclement weather to pass. Boats have been moored overnight at space X15 following detainment by the Washington County Sheriff several times a season.^[105]

63. In non-emergency situations, however, more than four boats have also been parked for longer periods of time. Four members of the public observed greater than four watercraft moored overnight at Beanies on several occasions in 1998 and 1999. Robert Treuter lives just south of Beanies on adjacent property. He observed more than five boats moored overnight between 25 and 30 times in 1998 and four to five times in 1999. These boats were in spaces X3-X7; His duration of observation was less than 12 hours. Treuter also observed boats tied overnight at X1. In 1998, Louis Furlong, another neighbor, observed six boats at spaces X2-X7.^[106] Mr. Furlong's observations were corroborated by Bernard Lee, another resident.^[107] Mr. Lee observed one to two boats moored overnight at X2 and X3, in addition to the four pontoons regularly moored at X4-X7.^[108] James Stanton, a neighbor immediately north

of Beanies, observed more than four boats moored overnight at Beanies in 1998 on several occasions.^[109]

64. For the past few years, Gary Pruss rented a cabin on the Beanies property during the winter. He moored his boat at the gas dock space (X1) overnight for five consecutive days in 1999.^[110] Typically, Pruss moored his boat overnight only in the early spring and late fall for purposes of moving in and out of the cabin.^[111]

65. Numerous instances of greater than four-boat parking involved parking at the south dock space X3. Pruss may be parked in X3 for three or four hours during the summer while performing repairs for the Maus.^[112] The Maus' cruiser was observed parked at X3, at the same time as four pontoons occupied their regular slips, in both 1997 and 1998.^[113] The Maus believe their cruiser is parked overnight at X3 five or six times during the summer. The Maus' fifth pontoon is occasionally parked at X3 along with four pontoons in the slips.^[114] Boats have been parked at space X8 along with the four pontoons for more than one consecutive night on four separate occasions.^[115] The Maus gave permission to a boater to park his boat in the water for seven consecutive nights so that he could use his boat while his vehicle was being repaired.^[116]

66. The Maus admit that they moored more than four boats in the water overnight on many occasions in 1997 and 1998.^[117] Such occasions do not include emergency situations. But the Maus believe the actual duration of such "overlapping" moorings is short. For example, a fifth boat sometimes enters the facility in the early morning hours, following an overnight rental. Sometimes if the cruiser was coming back in at 7:00 at night and scheduled to go back out at 9:00 the next morning, the cruiser plus four pontoons would stay in the water overnight. Persons would sometimes bring the cruiser back in the middle of the night. Dottie Mau estimated that the four pontoons and the cruiser were in the water together overnight roughly a dozen times a year.^[118] However, she does not believe that all of them were moored together for more than 12 hours.^[119] During busy weekends, the boats are in and out frequently, and the Maus did not keep any record of exactly when they came in and exactly when they left so that it is impossible to determine whether more than four boats were moored for more than 12 hours. The Maus did, however, attempt to pull a pontoon boat out of the water if they knew that they were getting close to a violation. As Gary Mau testified:

If, in fact, we have four pontoons that have already returned and a fifth one comes back, we have two-way radios, and we will get on the radio to the shop, inside the shop, where the schedule is kept and say, are one of these pontoons scheduled to go out in the next hour or so, or do we need to pull it, and we will make that decision, OK, we now have five pontoons sitting at the dock. Is one going out pretty soon or should we pull one out of the water and we will make that decision at that point. If another one is scheduled to go out shortly, we wouldn't pull it if it is only going to be an hour or so.^[120]

The Administrative Law Judge believes that this attentive procedure was much more frequent in the later part of 1998 and in 1999 than it was in 1997 and the early part of 1998.

APPLICABLE LAW

67. Minn. Stat. § 103G.245 provides that persons must have a public waters work permit in order to “change or diminish the course, current or cross-section of public waters, entirely or partially within the state, by any means, including filling, excavating, or placing of materials in or on the beds of public waters.”

68. Minn. R. 4410.3100, subp. 1 provides that “[i]f an EAW or EIS is required for a governmental action under parts 4410.0200 to 4410.7500, or if a petition for an EAW is filed under part 4410.1100, a project may not be started and a final governmental decision may not be made to grant a permit, approve a project, or begin a project, until:

- A. a petition for an EAW is dismissed;
- B. a negative declaration on the need for an EIS is issued;
- C. an EIS is determined adequate; or
- D. a variance is granted under subparts 3 to 7 or the action is an emergency under subpart 8.”

70. Minn. R. 4410.4400, subp. 1 and subp. 19 provide that an “EIS must be prepared for...construction of a new or expansion of an existing marina, harbor, or mooring project on a state or federally designated wild and scenic river....”

71. Minn. R. 6115.0211, subp. 4 provides that a “permit shall be required for the construction or reconstruction of all offshore breakwaters and marinas. These structures shall be permitted provided the following general conditions and the additional listed specific conditions are met....”

72. Minn. R. 6115.0170, subp. 37 defines “structure” to be “any building, footing, foundation, slab, roof, boathouse, deck, wall, or any other object extending over, anchored, or permanently attached to the bed or bank of a protected water.”

73. Minn. R. 6115.0170, subp. 4 defines “breakwater” to be “an offshore structure intended to protect a shore area, harbor, or marina from wave and current action, erosion, or sedimentation.”

74. Minn. R. 6115.0170, subp. 16 defines “harbor” to be “either an inland or offshore area protected from waves which is intended for the mooring of watercraft.”

75. Minn. R. 6115.0170, subp. 7 defines "dock" to be a "narrow platform extending east from the shoreline intended for ingress and egress for moored watercraft...."

76. Minn. R. 6115.0170, subp. 20 defines "marina" to be "either an inland or offshore structure for the concentrated mooring of five or more watercraft wherein facilities are provided for ancillary services such as boat mooring, storage, fueling, launching, mechanical repairs, sanitary pumpout, and restaurant services."

77. Minn. R. 6105.0410, subp. 2 allows "new marinas or marina expansions" in the Beanies area only if:

They are in the public interest, their size does not exceed the resource limitations of the site, and their design involves utilization of existing harbors in the watercourse or construction of harbors landward of the watercourse.

The design of a marina shall allow for screening between the harbor and the main channel of the watercourse so as to make marina facilities visually inconspicuous in summer months as viewed from the river.

An alternative to use of the water surface for new marinas or marina expansions could be the provision of dry-docking facilities for the storage of boats during the open-water season.

78. Minn. R. 4410.0200, subp. 28 defines "expansion" as "an extension of the capability of a facility to produce or operate beyond its existing capacity. It excludes repairs or renovations that do not increase the capacity of the facility."

79. Minn. R. 6115.0170, subp. 36 defines "seasonal dock" to be "a dock so designed and constructed that it may be removed from the lake or stream bed on a seasonal basis. All components such as supports, decking, and footings must be capable of removal by nonmechanized means."

80. Minn. R. 6115.0210, subp. 4(A)(4) states that no permit is required to "construct, reconstruct, or install a seasonal dock...provided...the structure is not used or intended to be used as a marina."

Based upon the foregoing Findings, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The hearing notice issued in this proceeding complies with requirements of Minn. Stat. § 103G.311, Minn. Stat. Ch. 14, and the Rules of the Office of Administrative Hearings. All relevant substantive and procedural requirements of law and rule have been fulfilled so as to vest the Commissioner and the Administrative Law Judge with jurisdiction in this matter.

2. The St. Croix River is a protected public water pursuant to Minn. Stat. § 103G.005, subd. 15. It was identified and inventoried pursuant to Minn. Stat. § 103G.201 and listed on the Washington County Protected Waters and Wetlands Inventory dated July 22, 1985.

3. Minn. Stat. § 103F.351 designates the St. Croix River as a state and federally designated wild and scenic river.

4. The bed of the St. Croix River is defined as all land below the ordinary high water level (OHW), as defined in Minn. Stat. § 103G.005, which is elevation 675.0 ft., NGVD 1929.

5. The construction of the proposed fishing pier/breakwater dock illustrated in DNR Ex. 10 would create a “harbor” within the meaning of Minn. R. part 6115.0170, subp. 16. Therefore, it must be preceded by an environmental impact statement pursuant to Minn. R. part 4410.4400, subparts 1 and 19, and the Department may not grant a permit for it until one of the actions set forth in Minn. R. part 4410.3100, subp. 1 is met.

6. The Department is not estopped from requiring a permit for the harbor, and an EIS that precedes the permit. The Department is not estopped from requiring the removal of the pilings if no permit is granted.

7. Provisions of the Commissioner’s Findings of Fact and Order relating to the pilings, which were installed to hold the proposed fishing pier/breakwater, are enforceable, and they are affirmed.

8. The boats stored on the platforms on the north side of the north dock should be counted for purposes of determining whether or not the facility constitutes a marina.

9. The dockage proposal submitted by the Maus cannot be said to be either a marina or not a marina, within the meaning of Minn. R. part 6115.0170, subp. 20, without reference to the manner in which it will be operated. If there are no limitations on operations, then it is a marina. But the Maus are entitled to have the Department set limitations on the use of the docks such that, if the Maus operate within those limitations, the facility will not constitute a marina.

Based on the foregoing, the Administrative Law Judge makes the following:

RECOMMENDATION

1. That all provisions of the Commissioner’s Findings of Fact and Order relating to the creation of a harbor be **AFFIRMED**, but that the Maus be given a reasonable period of time to decide whether or not they are willing to comply with the environmental review requirements and seek a harbor permit before they must remove the pilings.

2. That Department staff and the Maus negotiate operating provisions, of a type similar to those proposed by the Maus in their post-hearing brief (at page 19), so as to enable the Maus to operate their facility without it being deemed to be a marina.^[121] This could be in the context of a stipulation agreement to resolve this matter, a consent order in District Court, or any other form acceptable to the Department and the Maus. It would be reasonable that the agreement contain enforceable penalties should the Maus fail to abide by it. If the parties are unable to agree, then the Order to Restore should be affirmed in its entirety.

Dated this 24th day of August 1999.

s/ Allan W. Klein

ALLAN W. KLEIN

Administrative Law Judge

Reported: Court Reported, Pat Carl & Assoc.

MEMORANDUM

The Department is not estopped from asserting that the facility, if built as proposed, would be a harbor. Nor is it estopped from asserting that the boats stored on the platform on the north dock should be counted in determining whether or not the facility is a marina.

Equitable estoppel is grounded in the idea of fairness – that it would be unfair to allow a person to knowingly make a false representation of fact and then, at some later time after the other side had relied upon the misrepresentation to its detriment, allow the first party to assert some legal right contrary to the earlier misstatement. In this case, the Maus argue that because Shodeen did not tell them that what they were proposing would constitute a harbor, that now the Department is estopped from asserting that. The Maus are also arguing that since Shodeen affirmatively told them that the boats stored on top of the platforms attached to the north dock would not be counted, that now the Department cannot count them. In both cases, the essential argument is one of fairness.

The courts have addressed similar arguments many times over the years. They have, in a few cases, applied equitable estoppel to State agencies. But in the majority of cases where it has been raised, the argument has been rejected. The Minnesota Supreme Court has held that a party attempting to assert equitable estoppel against a government entity bears a “heavy burden of proof.”^[122] The court has stated that it does not “envision that estoppel will be freely applied against the government.”^[123] The reason for this is that typically estoppel is raised in situations where the proposed action is contrary to the public interest. The court has directed triers of fact to weigh whether the public interest frustrated by the estoppel is greater or lesser than the equities of the case.^[124]

There are five elements which must be proved to equitably estop the government:

1. The government made a misrepresentation of a material fact;
2. The government knew the representation was false;
3. The government intended that its representation be acted upon;
4. The claimant did not know the facts; and
5. The claimant relied upon the government's misrepresentation to his detriment.^[125]

In this case, estoppel will not lie to prevent the Department's assertion that the plan proposed the creation of a harbor, because Shodeen's failure to spot the issue does not rise to the level of a knowing misrepresentation. It was not affirmative misconduct. Rather, it was inadvertence, mistake or imperfect conduct.^[126] In the case of counting boats on the north dock platforms, although Shodeen did make affirmative statements to the effect that they would not be included, she made those statements believing them to be true. She did not know that they were false. Moreover, the Maus have not shown that they relied upon those statements to their detriment in terms of building their docks. The Administrative Law Judge suspects that the Maus would have built the same dock configuration, but without the platforms, if they had been properly informed from the start. They need the south dock to store their pontoon boats, and they need the north dock to help persons launching from the ramp. While they would not have placed the platforms onto the north dock had they known they would be counted for mooring spaces, that is not a substantial enough investment to frustrate the public interest. In other words, applying the balancing test, the Administrative Law Judge finds more weight in favor of applying the marina rules. The photographs bear out the fact that those fishing boats, when coupled with the other pontoons and structures, do present a substantial visual impact.^[127]

While the Administrative Law Judge finds in favor of the Department on both the harbor and boat count issues, he also finds that the Maus are justified in their concerns about not getting all of the rules up front and clearly stated. That is why he has recommended that the Department put in writing how the Maus ought to operate their facility so as to avoid being classified as a marina. The Maus are entitled to a straightforward set of rules which are "reasonable for the facility and the way they're operating."^[128] That is what the Department does with other facilities, and it should be possible to do the same thing for Beanies. Beanies does provide a public service in that it allows members of the public who do not have the wherewithal to rent a permanent space in a full size marina to still exercise their rights to use and enjoy the river. It also provides a convenience for river users who need to stop for gas, food, or whatever. This public service ought to be allowed to continue, but tempered by a recognition of the public's interest in attempting to minimize the artificial encroachments on this riverway.

^[11] Dock space is used solely by Beanies or its customers, except for a limited number of emergency situations outlined in Finding 62 below.

- [2] Hirte Test. p. 210.
- [3] Hirte Test. p. 213, 237; DNR Ex. 44.
- [4] *Id.*, p. 214.
- [5] Hirte Test. p. 217; Toenjes Test. pp. 236-37.
- [6] Hirte Test. p. 223; Furlong Test. p. 349; Stanton Test. pp. 372-73; DNR Ex. 44.
- [7] Hirte Test. pp. 225-26.
- [8] DNR Ex. 28, 38-40, 52; Mau Ex. 36; Hirte Test. pp. 227-28.
- [9] Hirte Test. p. 230 DNR Ex. 39-40.
- [10] Hirte Test. pp. 227-28; DNR Ex. 39; Mau Ex. 37.
- [11] Shodeen Test. p. 141.
- [12] DNR Ex. 27.
- [13] DNR Ex. 49.
- [14] Shodeen Test. p. 145-146.
- [15] DNR Ex. 51.
- [16] DNR Ex. 50.
- [17] DNR Ex. 48.
- [18] Mau Ex. 18.
- [19] DNR Ex. 18
- [20] *Id.*
- [21] DNR Ex. 20
- [22] DNR Ex. 21
- [23] DNR Ex. 29
- [24] DNR Ex. 22
- [25] DNR Ex. 45
- [26] The Administrative Law Judge understands that the word “harbor” carries a particular legal significance in this case. The use of the word “harbor” in this Finding is intended to communicate a picture of what was being proposed by the Maus in 1992. It is not intended to communicate any legal significance at this point.
- [27] DNR Ex. 23, Ex. II-A.
- [28] Maus Ex. 7.
- [29] DNR Ex. 25.
- [30] Ex. 19, p.1.
- [31] *Id.*, p. 2.
- [32] Maus Ex. 11.
- [33] Mau Test. pp. 502-503.
- [34] Maus Ex. 5.
- [35] DNR Ex. 31, attachments, P. 2 of 2.
- [36] Homouth Test. p. 78.
- [37] DNR Ex. 33.
- [38] Shodeen Test., p. 168.
- [39] *Id.*, p. 152.
- [40] Shodeen Test. p. 170.
- [41] Mau Test. pp. 261-262.
- [42] Mau Ex. 16.
- [43] Maus Ex. 1
- [44] *Id.*, p. 4.
- [45] DNR Ex. 32.
- [46] Mau Test. p. 262; DNR Ex. 34.
- [47] All references to the “X # locations” referred to the blown up version of DNR Ex. 34 which is mounted on a piece of posterboard and marked with red pen. A copy of this marked up exhibit is attached to this report for convenience.
- [48] Mau Test. p. 502.
- [49] *Id.*
- [50] DNR Ex. 32, Drawing; Fig. 1.
- [51] DNR Ex. 38-40; Mau Ex. 36.
- [52] Mau Ex. 14.

[53] Mau Ex. 13.
[54] Nelson Test. pp.127-128; DNR Ex. 10.
[55] Johnson Test., pp. 389-391.
[56] Auguston Test., p. 200.
[57] DNR Ex. 17.
[58] Mau Test, p. 495.
[59] Homuth Test. p. 35.
[60] Shodeen Test. p. 155; DNR Ex. 6 and 7.
[61] Shodeen Test. p. 156-57.
[62] Shodeen Test, p. 168; Mau Ex. 2, p. 1.
[63] *Id.*
[64] DNR Ex. 8.
[65] DNR Ex. 9.
[66] DNR Ex. 10.
[67] DNR Ex. 34.
[68] The Maus removed the jet ski lift shortly after July of 1997 after being told to do so by Don Seeman of the Corps. Mau Test. p. 415.
[69] DNR Ex. 36, Augustin Test. p. 203.
[70] DNR Ex. 12.
[71] DNR Ex. 14.
[72] Mau Ex. 3.
[73] DNR Ex. 1 and 2.
[74] DNR Ex. 46.
[75] DNR Ex. 47.
[76] Tr. pp. 55-56.
[77] See Findings 24 and 25 above.
[78] Shodeen Test. p. 168.
[79] *Id.* p. 170.
[80] Shodeen Test. p. 159.
[81] Mau Test. pp. 316-317.
[82] Homouth Test., pp. 49-52; Shodeen Test. pp. 176-178.
[83] Tr. pp. 318-319.
[84] Tr. pp. 320-321.
[85] Homuth Test. p. 50; Shodeen Test. p. 177.
[86] Minn. R. part 6115.0170, subparts 20 and 23 (1997).
[87] Homouth Test. pp. 49-50.
[88] Mau Test. p. 409.
[89] Mau Test. pp. 410 and 427.
[90] Mau Test. pp. 454-55.
[91] Mau Test. pp. 422-23.
[92] Mau Test. p. 421.
[93] See Tr. pp. 43-49.
[94] Mau Test. p. 431. These two platforms are approximately 12' x 12', and are mounted on the north side of the north dock. They are only a foot or two above the water surface, so that the water surface is unusable for any other purpose. They can be clearly seen in photos, DNR Ex. 56-61.
[95] Homouth Test. pp. 39-40.
[96] Homouth Test. p. 72.
[97] Mau Test. pp. 447-448 and 503; Shodeen Test. pp. 165-167.
[98] See Finding 25.
[99] Mau Ex. 2.
[100] Mau Test. p. 452.
[101] Nelson Test. p. 133.
[102] Hirte Test. p. 232; Toenjes Test. pp. 244-245.
[103] Mau Test. pp. 280-81.
[104] Mau Test. pp. 280-281; Toenjes Test. pp. 244-245.
[105] Mau Test. p. 324; Hirte Test. p. 232; Toenjes Test. p. 239.

[\[106\]](#) Furlong Test. p. 351.

[\[107\]](#) Lee Test. p. 362.

[\[108\]](#) *Id.*, p. 363.

[\[109\]](#) Stanton Test. p. 376-77.

[\[110\]](#) DNR Ex. 55; Mau Test. p. 320.

[\[111\]](#) Mau Test. p. 430.

[\[112\]](#) Mau Test. p. 407.

[\[113\]](#) DNR Ex. 59, 61.

[\[114\]](#) DNR Ex. 60.

[\[115\]](#) Mau Test. p. 326.

[\[116\]](#) Mau Test. p. 400; DNR Ex. 56-58.

[\[117\]](#) Mau Test. pp. 405, 421-424, 479-81.

[\[118\]](#) Mau Test. pp. 286-288.

[\[119\]](#) Mau Test. pp. 421-422.

[\[120\]](#) Mau Test. pp. 454-55.

[\[121\]](#) The parties agreed at the start of the hearing that the scope of the hearing would be limited to determining whether or not the facility, as proposed, would constitute a harbor or a marina (or both). It was specifically agreed that the hearing would not get into detailed permit conditions. Therefore, the reference to the post-hearing brief is only intended to refer to the general type of conditions to be negotiated. The Administrative Law Judge does not intend to express any opinion about the details proposed in the brief.

[\[122\]](#) *Brown v. Minnesota Department of Public Welfare*, 368 N.W. 2d 906 (Minn. 1985), reversing 354 N.W. 2d 115 (Minn. App. 1984).

[\[123\]](#) *Mesaba Aviation Div. v. Itasca County*, 258 N.W. 2d 877, 880 (Minn. 1977).

[\[124\]](#) *Brown*, 368 N.W. 2d at 910.

[\[125\]](#) *REM-Canby, Inc. v. Minnesota Department of Human Services*, 494 N.W. 2d 71, 74 (Minn. App. 1992), rev. denied (Minn. Feb. 25, 1993).

[\[126\]](#) *Shetka v. Aitkin County*, 541 N.W. 2d 349, 353 (Minn. App. 1995), rev. denied (Minn. Feb. 27, 1996). See also, *Stillwater Twp. v. Rivard*, 457 N.W. 2d 906, 911 (Minn. App. 1996).

[\[127\]](#) The same logic applies to the other minor structures noted in the Order to Restore. To the extent that the parties can negotiate terms of use, they can stay. But if the parties cannot negotiate terms of use, the Department is not estopped from requiring their removal.

[\[128\]](#) *Homouth Test.* p. 50.